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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 60.

THE PENNSYLVANIA RAILROAD COMPANY,

Petitioner,

against

CHARLES E. O'ROURKE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONSE TO PETITION FOR REHEARING

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This action was brought by respondent, petitioner for rehearing herein, under the Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. C., §§ 51 *et seq.* and alleged a violation of the Safety Appliance Acts, 27 Stat. 531, 45 U. S. C., §§ 1 *et seq.* The United States District Court for the Eastern District of New York decided that the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C., §§ 901 *et seq.*, applied exclusively (99 F. Supp. 506; R. 40-44). The United States Court of Appeals reversed on the ground that the Liability Act covered "railroad employees injured while engaged in railroad work on navigable waters" and that respondent

was "not employed in maritime employment . . . within the meaning of the Compensation Act" (194 F. 2nd 612; R. 48-53). The petition for a writ of certiorari was filed on May 12, 1952, and was granted on October 13, 1952 (344 U. S. 811). This Court, on January 12, 1953, handed down its decision reversing the decision of the Court of Appeals and holding the Longshoremen's and Harbor Workers' Compensation Act applicable (—— U. S. ——, 73 S. Ct. 302).

Respondent, petitioner for rehearing herein, in urging this Court to grant a rehearing raises no arguments that were not heretofore urged, cites no cases not heretofore presented to this Court for its consideration, and asserts no changes of law or fact occurring since the decision of this Court.

The argument of respondent, now made on page 2 of his petition for rehearing, to the effect that this Court has recognized the hazards of operational railroading and has liberally construed the Liability Act and the Safety Appliance Acts for the benefit of employees, was made on pages 4, 10 and 11 of his main brief, wherein the same decisions were cited, to wit, *Urie* v. *Thompson*, 337 U. S. 163, *Lilly* v. *Grand Trunk Western R. Co.*, 317 U. S. 481 and *Coray* v. *Southern Pac. Co.*, 335 U. S. 520.

The doctrine with respect to a "twilight zone" was called to the attention of District Judge Kennedy by plaintiff and considered in the District Court opinion (R. 40, 43-44). It was considered at some length in the main brief of petitioner, respondent on this application, pages 12-14. The cases of *Davis* v. *Department of Labor*, 317 U. S. 249, *Bethlehem Steel Company* v. *Moores*, 335 U. S. 874 and *Baskin* v. *Industrial Accident Commission*, 338 U. S. 854, relied upon in the application for rehearing *sub nom. Kaiser Co.* v. *Baskin*, 340 U. S. 886, and many others were therein cited and discussed. Upon the oral argument before this Court, counsel for petitioner and counsel for

respondent were each asked whether this case required the application of the said doctrine, and both counsel answered in the negative. The applicability of the doctrine was also considered by this Court (—— U. S. ——, 73 S. Ct. 302, 306, note 8). Moreover, the question whether the loading or unloading of freight cars from a car float, moored in navigable waters, is railroad employment or maritime employment was considered at length both in the main brief of petitioner, respondent on this application, pages 7-10, 14-15, and the main brief of respondent, pages 4-10, 12.

As this Court held, this case falls within the ambit of its decision in *Nogueirà* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, and the Longshoremen's and Harbor Workers' Compensation Act is accordingly applicable.

It is respectfully submitted that the petition for rehearing should be denied.

JOHN VANCE HEWITT,
Attorney for Petitioner,
Respondent herein.

THOMAS F. AHRENSFELD,
of Counsel.

New York, N. Y., January 29, 1953.